Filed 12/21/09 In re Taylor CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re TRACY TAYLOR on Habeas Corpus.	A123880 (Del Norte County Super. Ct. No. HCPB-07-5132)

Respondent Kelly Harrington, Acting Warden at Kern Valley State Prison (Warden), appeals the trial court's order granting petitioner Tracy Taylor's petition for writ of habeas corpus. In ruling on the habeas petition, the court found that prison restrictions on the amount of religious liquids petitioner can purchase and possess violate his rights under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) (42 U.S.C. § 2000cc) as it applies to his practice of the Thelema faith. We reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Since 1989, petitioner has been serving an indeterminate sentence of 27 years to life for first degree murder with a firearm enhancement.[1] (Pen. Code, §§187, 12022.5.)

On August 3, 2007, following the partial denial of his administrative appeal, petitioner filed a petition for habeas corpus relief, alleging that a Pelican Bay State Prison

[1] A few weeks after his original sentencing hearing, petitioner was sentenced to two years for one count of escape with force. (Pen. Code, § 4532, subd. (b).)

(PBSP) policy restricting his access to religious liquids violated the RLUIPA.[2] He sought an order allowing him to purchase and possess religious oils, colognes, and perfumes in an amount of one pound each, to be ordered by him from the vendor of his choice.

On August 29, 2007, the trial court asked the Attorney General to provide an informal response on behalf of the warden at PBSP, pursuant to California Rules of Court, rule 4.551.[3]

On September 11, 2007, PBSP Associate Warden Mark Cook established a new policy regarding the procurement of religious oil. Under the policy, each inmate who requests and is approved to purchase religious oil is permitted to receive no more than four ounces per quarter. According to Cook, the policy is intended to address several security concerns: "For example, religious oils may be used: in physical attacks on the prison staff or other inmates; as a lubricant to assist inmates in slipping through handcuffs; to render locks inoperable; as a means to secrete or hide drugs; as a means for barter or monetary exchange; to disguise illicit conduct in an inmate's cell; in the manufacture of inmate weapons; and/or as a general flammable substance."

On October 3, 2007, PBSP filed its informal response to the petition.

On October 15, 2007, petitioner filed his reply to PBSP's informal response.

On November 15, 2007, the trial court issued an order to show cause. In its order, the court noted PBSP did not challenge the sincerity of petitioner's religious beliefs. Additionally, the court found petitioner had not made a sufficient showing that the failure to allow him to possess one pound of prayer oils and fragrances constituted a substantial burden on his exercise of religion. However, the court directed PBSP to address the following issues: (1) petitioner's allegation that the oil obtainable from the prison vendor

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[2] On June 14, 2007, the California Department of Correction and Rehabilitation (CDCR) director's-level decision granted petitioner the right to receive prayer oil only, not cologne. The director found petitioner's request to receive one pound of oil to be excessive, noting that this "inordinate amount of oil could present a threat to the security of the institution." Prison authorities were ordered to allow petitioner to receive prayer oil "according to institutional procedures."

[3] We are informed that petitioner is currently housed at Kern Valley State Prison.

was "personal body oil for women," and not religious oil, (2) his assertion that he was not able to buy cologne used for religious purposes from the canteen, despite a contrary finding in the director's-level decision, and (3) his complaint that he was being prevented from using the three ounces of prayer oil he already owned.

On December 13, 2007, the Attorney General filed a return on behalf of PBSP. In the return, PBSP asserted it had never placed an absolute ban on petitioner's right to use religious oil, and that the oil available through Walkenhorst, the prison vendor, was not personal body oil for women. PBSP noted that based on the prison chaplain's declaration, it appeared that petitioner's three ounces of religious oil was not among his property delivered when he transferred to the prison. It further claimed that petitioner could order suitable cologne from Walkenhorst.

On February 13, 2008, petitioner filed a denial.

On March 12, 2008, the court issued an order granting an evidentiary hearing. The hearing was continued several times, and the parties agreed to submit declarations on the matter in lieu of the evidentiary hearing. They also agreed to narrow the contested issues.

On August 13, 2008, Suzan Hubbard, Director of the Division of Adult Institutions, filed a declaration stipulating that the CDCR would allow petitioner to purchase and possess a total of four ounces of religious oils, perfumes, and/or colognes per quarter while incarcerated at any CDCR institution. Further, petitioner would be allowed to order the religious liquids from any vendor approved by his institution's chaplain or warden. The CDCR reserved the right to restrict petitioner' possession of these materials if his privilege group status changed, if he were placed in the security housing unit or behavioral modification unit, or if the CDCR amended its policies concerning the issue.

On September 2, 2008, petitioner submitted a declaration in which he stated "most" vendors sell four ounces of oil for $3 and that shipping charges cost $8. He stated that he would not be able to afford to spend $3 on each purchase of four ounces of oil plus the attendant shipping costs. His attorney submitted a brief stating four ounces of oil

cost $12 and that vendors will not ship orders for less than $21 of product. The brief includes a product listing from a business called "Garden of Fragrance," which states that all ounces are $4, and includes the notation "MINIMUM ORDER IS $21.00 PLUS SHIPPING." No evidence on the shipping policies of any other vendor was presented.

On November 25, 2008, the trial court issued an order granting petitioner relief. The order notes that petitioner had on at least two previous occasions brought successful petitions to require prison officials in Sacramento and Del Norte counties to allow him to use tobacco in his religious ceremonies. The court also observed that following the issuance of its own tobacco order, petitioner "was caught attempting to smuggle some of that tobacco back to his cell." The instant order continues: "Petitioner has established practical difficulties, if not impossibilities, in purchasing the relatively small amounts of oils, perfumes and colognes that [PBSP] proposes as a limit (four ounces)." The order requires prison staff to "allow petitioner to possess up to a total of 16 ounces of oils, perfumes, and colognes in any combination of his choosing." The court further ordered that petitioner be allowed to order up to 12 ounces of any of these products at a time from the vendor of his choice, subject to prison staff's "reasonable right to disapprove of any vendors for reasons stated in writing at the time of disapproval." Petitioner can be limited to having no more than four ounces in his cell at any given time, and any "allowed amounts in excess" are to be kept by the prison chaplain or other appropriate official. Additionally, the court ordered CDCR to notify the superior court – in whichever county petitioner is incarcerated at that time – within 30 days if prison staff decide to suspend petitioner's ability to possess the requisite quantities of religious liquids. The court further stated that its order would remain in effect so long as petitioner is incarcerated within the CDCR. This appeal followed.

DISCUSSION

I. Standard of Review

While the trial court ordered an evidentiary hearing, no such hearing was held and the case was decided based on the declarations filed by the parties. "The facts being

undisputed, the question presented on appeal is a question of law, and we review such questions de novo." (*In re Zepeda* (2006) 141 Cal.App.4th 1493, 1497.)

II. Habeas Corpus

The Warden suggests petitioner is not entitled to bring a claim under the RLUIPA via a petition for habeas corpus. He claims "it is unclear whether the writ permits relief for challenges solely concerning a federal statutory right." While our research has disclosed no published California cases concerning the use of habeas corpus petitions to assert federal statutory rights as they pertain to conditions of confinement, we conclude the petition in this case was not improperly brought.

A. State courts have concurrent jurisdiction over RLUIPA claims

Preliminarily, we conclude state courts may entertain claims brought under the RLUIPA. There is a presumption that state courts have concurrent jurisdiction with federal courts over federal claims: "In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. [Citations.] Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." (*Gulf Offshore Co. v. Mobil Oil Corp.* (1981) 453 U.S. 473, 478 (*Gulf*).)

Section 2000cc–2 of the RLUIPA states that a cause of action may be asserted "in a judicial proceeding" against "a government" (42 U.S.C § 2000cc–2(a)), and adjudication of such a cause of action will be given full faith and credit provided the "claimant had a full and fair adjudication of that claim in the non-Federal forum." (*Id.* at 2(c).) We interpret the language of Section 2000cc–2 to infer that Congress meant for state courts to hear such causes of action based on RLUIPA violations, otherwise Congress would not include the standard full faith and credit clause in the statute. Further, a review of the RLUIPA's legislative history fails to provide an "unmistakable

implication" that Congress intended to grant federal courts exclusive jurisdiction. (See 146 Cong. Rec. S7774 (July 27, 2000).)

The final factor, the existence of a clear incompatibility between state and federal jurisdiction, requires consideration of the "desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." (*Gulf, supra,* 453 U.S. 473, 483–484.) While uniformity in interpretation and application of any statute is desirable, like any other federal statute, the final word on interpretation and application will be spoken by the United States Supreme Court. There is nothing so peculiar about a religious freedom claim brought by an institutionalized person that warrants a conclusion that only the federal courts should entertain them under RLUIPA. Thus, the presumption that state courts have concurrent jurisdiction over RLUIPA claims has not been rebutted.

B. Habeas corpus proceedings

We conclude petitioner's RLUIPA claim is properly brought in this habeas proceeding. Penal Code section 1473, subdivision (a), provides: "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." Subdivision (d) provides: "Nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies."

Our courts have observed that the function of habeas corpus "has evolved from the traditional remedy for release of a prisoner to include a declaration of rights of a prisoner not entitled to outright release. [Citations.] The writ of habeas corpus may be used to secure fundamental rights of a person lawfully in custody." (*In re Brindle* (1979) 91 Cal.App.3d 660, 669; see *In re Riddle* (1962) 57 Cal.2d 848, 851 [writ of habeas corpus can be used to protect "fundamental basic rights" of prisoners].) More recent cases have dropped the limitation to "fundamental" rights, stating that the writ of habeas corpus can be used by inmates to address a deprivation of their "rights" while in confinement. (*In re Arias* (1986) 42 Cal.3d 667, 678, abrogated by statute on another point as recognized in

Thompson v. Department of Corrections (2001) 25 Cal.4th 117, 130; *In re Davis* (1979) 25 Cal.3d 384, 387.) Over a decade ago, this division recognized "that the scope of the writ has been expanded to include . . . use by one lawfully in custody to obtain a declaration and enforcement of rights in confinement." (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1010.)

We also note that while petitioner could perhaps have utilized a different procedural vehicle to pursue his claims, our courts take a flexible approach in addressing habeas actions. For example, in *In re Head* (1986) 42 Cal.3d 223, the CDRC challenged an award of attorney fees, contending the fees were appropriate in civil proceedings only, not in habeas actions. The Supreme Court disagreed. In rejecting the parties' attempt to characterize the proceedings as either criminal or civil the court held: "We shall conclude that the nature of the relief sought, not the label or procedural device by which the action is brought, is determinative of the right to seek fees under [Code of Civil Procedure] section 1021.5. The petitions here presented issues related to the conditions of confinement in a state prison and involved the rights of prison inmates generally. Vindication of these rights is not analogous to a defense against a criminal prosecution. Rather, as respondent concedes, the petitioners' claim is of such a nature that it might have been presented in a purely civil proceeding – by petition for writ of mandate or action for declaratory relief – in which case no question would be raised as to the propriety of the award. That petitioners elected to utilize the more expeditious, simplified and less expensive procedure of habeas corpus to vindicate their rights, should not affect the availability of a fee award." (*Id.* at p. 226, fn. omitted.)

In support of the Warden's argument that habeas corpus in not a proper means to address claims under the RLUIPA, he cites to *In re Bode* (1999) 74 Cal.App.4th 1002 (*Bode*), *In re Clark* (1993) 5 Cal.4th 750, and *Mayweathers v. Terhune* (E.D.Cal. 2004) 328 F.Supp.2d 1086 (*Mayweathers*). The authorities the Warden relies on are not persuasive.

In *Bode, supra,* the trial court had granted a prisoner's petition for habeas corpus, finding he had a right to a transcript of his parole consideration hearing within 30 days

under Penal Code section 3042, subdivision (b). (*Bode, supra,* 74 Cal.App.4th 1002, 1004.) The statute provides that members of the public have the right to inspect a copy of the transcript of a parole hearing within 30 days of the hearing. The appellate court reversed the lower court, holding that prisoners do not have a right to receive transcripts within 30 days because the statute pertains to the rights of members of the public only. (*Id*. at p. 1005.) The opinion is silent as to the rights of inmates to pursue state statutory claims by petitions for habeas corpus. Accordingly, this case does not support the Warden's argument that petitioner may not pursue his RLUIPA claim in a state habeas proceeding.

In *Clark, supra,* the Supreme Court denied an inmate's second petition for writ of habeas corpus challenging the judgment imposing the death penalty because the inmate failed to justify the untimeliness of his writ and failed to establish a fundamental miscarriage of justice in the imposition of his convictions or sentence. (*In re Clark, supra,* 5 Cal.4th 750, 797–799.) In addressing collateral attacks on judgments of conviction, the court observed in the footnote relied upon by the Warden: "Habeas corpus is an 'extraordinary remedy.' [Citation.] '[I]t may not be invoked where the accused has such a remedy under the orderly provisions of a statute designed to rule the specific case upon which he relies for his discharge. This would be an abuse of process, as his relief under the remedy provided by the statute would accomplish all that he was seeking and all that the writ of *habeas corpus* was ever designed to accomplish, to wit, the discharge of the accused.' [Citation.] 'The writ of *habeas corpus* was not created for the purposes of defeating or embarrassing justice, but to promote it.' [Citation.]" (*Id.* at p. 764, fn. 3.) While the court found the petition lacking in merit, it did not hold that the inmate did not have a right to pursue his claim. Moreover, the case did not involve conditions of confinement. Again, the case does not support the argument the Warden seeks to advance.

Finally, in *Mayweathers, supra,* Muslim inmates brought complaints under the RLUIPA and title 42 United States Code, section 1983, seeking relief with respect to prison policies regarding grooming and attendance of worship services. Among the

injunctive relief sought by the inmates was the removal from the custody files of " 'any and all documents reflecting disciplinary action or credit loss resulting from plaintiffs' attendance [of worship services] or from wearing beards for religious purposes.' " (*Mayweathers, supra*, 328 F.Supp.2d 1086, 1097.) Defendants objected to disciplinary expungement relief on the grounds that the proposed injunction would affect the length of plaintiffs' sentences, a matter that could be accomplished through a writ of habeas corpus only. In so arguing, the defendants relied on *Heck v. Humphrey* (1994) 512 U.S. 477, and its predecessor case, *Preiser v. Rodriguez* (1973) 411 U.S. 475, in which the United States Supreme Court held that prisoners are barred from suing for damages under title 42 United States Code, section 1983 for the loss of sentencing credits because such claims are more properly brought by a petition for writ of habeas corpus. The district court in *Mayweathers* held that the *Heck-Preiser* rule did not apply to claims brought under the RLUIPA. The court thus did not hold that plaintiffs would have been prevented from raising RLUIPA claims in a habeas petition. Rather, the court held that the plaintiffs were not required to proceed by habeas petition when seeking an injunction under RLUIPA that could potentially shorten the length of their sentences. (*Mayweathers, supra,* at pp. 1101–1102.) Again, this case does not support the Warden's argument that inmates may not bring RLUIPA claims in state habeas petitions.[4]

Having concluded petitioner's action was properly brought, we now proceed to consider the merits of his claims.

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[4] We note "The function of habeas corpus in California [state courts] differs somewhat from the function of the federal writ in this regard. In the federal system, habeas corpus proceedings are the mechanism whereby a prisoner can challenge the legality or duration of his or her confinement. Conditions of confinement, on the other hand, are more appropriately challenged by means of a civil rights action brought pursuant to 42 United States Code section 1983." (*In re Estevez* (2008) 165 Cal.App.4th 1445, 1461, fn. 6.) Thus, "Attacks . . . on conditions of confinement are not cognizable in a [federal] *habeas* petition." (*Robinson v. Young* (W.D. La., Aug. 31, 2009, Civ. A. No. 09-0963) 2009 U.S.Dist. Lexis 86353.) At least one federal court has stated that, in federal court, "To obtain relief under RLUIPA a prisoner must commence a non-habeas, civil action that would be subject to the Prison Litigation Reform Act (PLRA)." (*Khalid v. Dretke* (N.D. Tex., Feb. 7, 2005, No. 3:02-CV-1505-P) 2005 U.S.Dist. Lexis 4779; see generally *Madison v. Riter* (4th Cir. 2003) 355 F.3d 310, 314–315.)

III. RLUIPA

"RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens . . . ." (*Cutter v. Wilkinson* (2005) 544 U.S. 709, 714 (*Cutter*).) Section 3 of the RLUIPA (42 U.S.C. § 2000cc–1(a)(1)-(2)), provides, in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means . . . ." "The Act defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.' [Citation.] Section 3 applies when 'the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance,' . . . . 'A person may assert a violation of [the RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.' [Citation.]" (*Cutter, supra,* at pp. 715–716, fn. omitted [finding that the RLUIPA does not conflict with the Establishment Clause, and also noting that all states accept federal assistance for their prisons].)

It has been observed that the RLUIPA "imposes a higher burden than does the First Amendment in that the statute requires prison regulators to put forth a stronger justification for regulations that impinge on the religious practices of prison inmates." (*Mayfield v. Texas Dept. of Criminal Justice* (5th Cir. 2008) 529 F.3d 599, 612.) Yet balancing this higher burden is a legislative expectation that "courts entertaining complaints under [RLUIPA] would accord due deference to the experience and expertise of prison and jail administrators." (*Cutter, supra,* 544 U.S. 709, 717 [internal quotation marks and citations omitted].) Context matters in the application of RLUIPA standards within the secure prison environment. (*Cutter, supra,* at p. 723.) The Supreme Court has indicated that RLUIPA must be applied "with particular sensitivity to security concerns," and a consideration of the need to maintain " 'good order, security and discipline . . . .' " (*Cutter, supra,* at pp. 722, 723, citations omitted.)

"Under the RLUIPA, a plaintiff bears the responsibility of making a prima facie showing that the challenged policy constitutes a substantial burden on the exercise of his religious beliefs. [Citation.] The defendant then bears the burden of showing that any substantial burden on the plaintiff's exercise of his religious beliefs is both 'in furtherance of a compelling governmental interest' and the 'least restrictive means of furthering that compelling governmental interest.' [Citation.] 'Prison security is a compelling governmental interest.' [Citation.] While prison administrators are entitled to deference with regard to prison security, to meet their burden to show 'least restrictive means' they must demonstrate that they have ' "considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." ' [Citations.]" (*Lewis v. Ollison* (C.D.Cal. 2008) 571 F.Supp.2d 1162, 1168.)

A. Substantial burden

On appeal, the Warden claims the trial court erred in concluding that the regulation allowing prisoners to purchase and possess four ounces of religious liquid per quarter constitutes a "substantial burden" on petitioner's exercise of his Thelema faith. We agree.

While RLUIPA does not define " 'substantial burden,' " the Ninth Circuit has stated the following: "[I]n the context of a land use suit brought under RLUIPA, we have explained that 'for a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent. That is, a "substantial burden" on "religious exercise" must impose a significantly great restriction or onus upon such exercise,' [citation]." (*Warsoldier v. Woodford* (9th Cir. 2005) 418 F.3d 989, 995;[5] see

[5] Courts in the 7th Circuit apply the following test for evaluating when a regulation imposes a "substantial burden" on religious exercise: "[I]in the context of RLUIPA's broad definition of religious exercise, a . . . regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." (*Civil Lib. for Urban Believers v. City of Chicago* (7th Cir. 2003) 342 F.3d 752, 761.) "In determining when an exercise has become 'effectively impracticable,' it is helpful to remember that in the context of the Free Exercise Clause, the Supreme Court held that a government imposes a substantial burden on a person's beliefs when

also, *San Jose Christian College v. Morgan Hill* (9th Cir. 2004) 360 F.3d 1024, 1034.) The focus of this initial inquiry necessarily is on the manner in which the inmate's religious exercise is impacted, rather than on the reasonableness of the facility's policy or regulation. (*Warsoldier, supra,* at p. 995.)

In the context of the First Amendment's free exercise clause, the United States Supreme Court has stated that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not constitute substantial burdens on religious exercise. (*Lyng v. Northwest Indian Cemetery Prot. Assn.* (1988) 485 U.S. 439, 450–451.) In *Lyng,* the court declared that for a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs. (*Ibid*.) Conversely, a government regulation does not substantially burden religious activity when it has only an incidental effect that makes it more difficult to practice the religion. (*Ibid*.; *Thiry v. Carlson* (10th Cir. 1996) 78 F.3d 1491, 1495.) Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient. (*Jolly v. Coughlin* (2d Cir. 1996) 76 F.3d 468, 477.) As Justice O'Connor noted in *Lyng,* "However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires." (*Lyng, supra,* at p. 452.)

In the present case, petitioner does not claim that four ounces of religious liquids per quarter is an insufficient amount for him to practice his religious rituals. His only complaints are that vendor-imposed shipping costs are excessive, and that a vendor may require him to place a minimum order in excess of the four ounces of liquids.

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it 'put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs.' [Citations.]" (*Koger v. Bryan* (7th Cir. 2008) 523 F.3d 789, 799.)

Regarding shipping costs, we are not persuaded that the charges constitute a "substantial burden" imposed by the prison on petitioner's exercise of his faith. We note the record does not include evidence of petitioner's financial resources. However, he stated in his pleadings that he was able to purchase large quantities of religious liquids in the past. Thus he would appear to have access to sufficient funds to obtain these substances within the limits set by the prison's regulation. Moreover, the burden incurred as a result of shipping costs is not the responsibility of the prison. If he were not incarcerated, petitioner would still have to pay shipping costs if he ordered his religious liquids by mail. Petitioner does not cite to any authority for the proposition that a prison creates a substantial burden on the exercise of religion when its regulations inadvertently cause an inmate to pay higher shipping costs in order to acquire an otherwise reasonable amount of ceremonial supplies.

We also note petitioner does not claim that he is prohibited from ordering non-liquid merchandise to meet a vendor's minimum order requirement. With respect to the Garden of Fragrance vendor, at a price of $4 per ounce, four ounces of oil would cost $16. Petitioner would need order only $5 of additional items to reach the $21 threshold imposed by this particular vendor. Thus, it appears that the prison regulation, at best, creates an inconvenience for petitioner. Further, we note the record contains an order sheet from a different vendor, which petitioner attached as an exhibit in support of his petition. Petitioner stated that he had used this vendor for "many years" prior to arriving at PBSP. The oils listed on this sheet are substantially more expensive than the oils provided by Garden of Fragrance, suggesting petitioner would have no difficulty in meeting the minimum purchase requirements, if any, imposed by his former vendor.

In sum, we conclude petitioner has not established that the four-ounce per quarter limitation on the purchase of religious liquids constitutes a substantial burden on his exercise of religion.

B. Compelling governmental interest

As noted above, if a substantial burden on an inmate's exercise of his religious beliefs is shown, the government then bears the burden of demonstrating that the

restriction is both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. In the present case, even if we were to find the limitations on petitioner's right to acquire and possess religious liquids constituted a substantial burden on his exercise of the Thelema faith, we would conclude that the prison regulation is justified by a compelling government interest.

In *Cutter, supra,* the United States Supreme Court explored the "compelling governmental interest" prong of RLUIPA, noting that it did not read RLUIPA "to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests." (*Cutter, supra,* 544 U.S. 709, 722.) The court further noted: "Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. [Citation.] They anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.' [Citations.]" (*Id.* at p. 723.) Additionally, the court noted: "Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition." (*Id.* at p. 726.) Lest any doubt remain, the court then repeated its message a final time: "It bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area." (*Id*. at p. 725, fn. 13.)

We agree with the Warden that the four-ounce limitation is justified by legitimate penological interests. In their declarations, prison officials satisfactorily set forth several compelling justifications for limiting the amount of religious liquids that may be

possessed in a prison setting. We also note petitioner is a level IV inmate.[6] He has a prior conviction for escape by force. The evidence in this case established that he had a history of abusing his religious privileges. In particular, he had attempted to smuggle a quantity of ceremonial tobacco out of the prison chapel. Thus, the Warden's desire to limit petitioner's access to ceremonial substances to no more than that which he needs to complete his religious rituals is well founded and clearly appropriate. Further, the CDCR stipulated that petitioner's four-ounce allowance would be maintained regardless of where he is housed in the future, provided that the amount is consistent with his privilege group status.[7]

In our view, the restriction also represents the least restrictive measure to achieve this compelling interest. In order to meet their burden to show the "least restrictive means," prison administrators must demonstrate that they have " 'considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.' " (*Greene v. Solano County Jail* (9th Cir. 2008) 513 F.3d 982, 989, citation omitted.) Here, the authorities had allowed inmates at PBSP to receive religious liquids through special order or personal packages, but had found there was "no way for prison officials to verify that these oils were not laced with other substances or otherwise tampered with." And while PBSP had previously allowed petitioner to store excess prayer liquids in the prison's chapel, we agree with the Warden that no evidence was presented suggesting similar storage arrangements are available at every California penal institution. In sum, given the deference that courts are required to give to prison administrators with respect to the management of prison facilities, we find that even if the regulations impose a

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[6] Inmates in state prison are classified as level I, II, III, or IV, based on a point system which takes into account a number of factors, including the background and behavior of each inmate. Level I is minimum security, and level IV represents maximum security. (See Cal. Code Regs., tit. 15, §§ 3375.1, 3377.)

[7] In light of this concession, we agree with the Warden that the trial court erred in requiring prison officials, for as long as petitioner is incarcerated, to notify the superior court within 30 days if prison staff decide to suspend his access to religious liquids below the amounts set forth in the order.

substantial burden on petitioner's religious exercise, that burden is justified by a compelling government interest in the safe, efficient management of our state's Level IV prison facilities.[8]

DISPOSITION

The order is reversed.

_____

Dondero, J.

We concur:

_____

Marchiano, P. J.

_____

Banke, J.

[8] We reach the same conclusion to the extent petitioner claims he is entitled to relief under the First Amendment's free exercise clause. By prohibiting government from imposing any substantial burden on an inmate's religious exercise unless the burden is justified by a compelling, and not just a legitimate, governmental interest, RLUIPA accords greater protection to an inmate than the free exercise clause of both the California and federal constitutions. (See *Guru Nanak Sikh Society v. County of Sutter* (E.D.Cal. 2003) 326 F.Supp.2d 1140, 1162, affirmed by *Guru Nanak Sikh Soc. v. County of Sutter* (9th Cir. 2006) 456 F.3d 978 [because petitioners' claims succeeded under RLUIPA, there was no need to consider whether they succeed under the lower level of scrutiny].) Thus, where we have addressed petitioner's claims under the RLUIPA standard, we need not address his constitutional claims as we have already applied the higher RLUIPA standard.